Public Prosecutor v Tang Cheng Chai

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 41–73 OF 2007
ZAMANI A RAHIM JC
1 SEPTEMBER 2009

Criminal Law — Customs Act (Malaysia) — s 135 — Firecrackers and fireworks, conveying — Offence of knowingly conveying prohibited goods — Presumption of knowledge of prohibited goods — Whether accused had rebutted defence on balance of probabilities — Whether magistrate had properly directed herself on law and facts — Customs Act 1967 s 135(1)(e), (2)

Acting on information received a team of customs officers lay in wait for a motor lorry bearing registration No PBQ 1894 ('the lorry'). When the officers spotted the lorry driven by the accused, who was alone in the lorry, they tailed it to a certain point and then directed the accused to stop the lorry. One of the customs officers then approached the accused, identified himself and requested the accused to unlock the padlock at the rear of the lorry. Two handphones and 85 boxes of firecrackers and fireworks were found in the lorry. An investigation into the case revealed that the lorry was registered under a business and was owned by one Heng Poh Ngong who had in turn rented the lorry to one Ah Hock who could not be traced. The accused was charged under s 135(1)(e) of the Customs Act 1967 ('the Act') and claimed trial to the charge. At the trial the prosecution raised the presumption of knowledge of prohibited goods under s 135(2) of the Act against the accused. At the end of the prosecution case it was found that that a prima facie case had been established against the accused and his defence was called. In his defence the accused gave evidence on oath that he had no knowledge of the firecrackers and fireworks in the lorry. He testified that he was paid by Ah Hock to drive to Changlun to bring prawn crackers and that he had believed that he was carrying boxes of prawn crackers in the lorry. The magistrate accepted the accused's defence for two reasons. Firstly because one of the two handphones seized from the rear of the lorry belonged to Ah Hock and secondly because the lorry was rented to Ah Hock. The accused was therefore found not guilty acquitted and discharged. Despite the acquittal of the accused, the magistrate had made an order of forfeiture of the motor lorry. This was an appeal against the magistrate's decision to acquit the accused. The prosecution submitted that the magistrate had misdirected herself on the law.

Held, allowing the prosecution's appeal:

(1) The approach taken by the magistrate to consider the defence was misplaced. It would appeal that she had introduced the element of exclusive possession into the offence of knowingly concerned in the conveying of prohibited goods under s 135(1)(e) of the Act. As such, she had omitted to properly address her mind as to whether the defence had rebutted, on the balance of probability, the presumption of knowledge under s 135(2) of the Act rather than labouring on the issue of exclusive possession. This was a misdirection by way of non-direction. If she had properly directed herself she would not have arrived at the decision she did (see paras 13 & 18).

(2) Further the magistrate had treated both burdens, that is, the burden to rebut the presumptions on the balance of probability and the burden to raise a reasonable doubt in the prosecution case as one and the same thing (see para 15).

[Bahasa Malaysia summary

Bertindak berdasarkan maklumat yang diterima, sekumpulan pegawai kastam menantikan lori motor yang bernombor pendaftaran PBQ 1894 ('lori'). Apabila pegawai-pegawai tersebut mengecam lori yang dipandu tertuduh yang bersendirian dalam lori tersebut, mereka mengekorinya sehingga suatu tempat dan kemudiannya mengarahkan tertuduh untuk menghentikan lori tersebut. Salah seorang daripada pegawai kastam tersebut menghampiri tertuduh, mengenalkan dirinya dan meminta tertuduh untuk membuka mangga di bahagian belakang lori tersebut. Dua telefon bimbit dan 85 kotak mercun dan bunga api didapati di dalam lori. Siasatan kes mendedahkan bahawa lori tersebut didaftarkan dan dimiliki oleh Heng Poh Ngong yang kemudiannya menyewakan lori tersebut kepada Ah Hock yang tidak dapat dikesan. Tertuduh dituduh di bawah s 135(1)(e) Akta Kastam 1967 ('Akta') dan menuntut perbicaraan untuk tuduhan tersebut. Di perbicaraan, pihak pendakwaan mengemukakan anggapan pengetahuan mengenai barang-barang yang dilarang di bawah s 135(2) Akta terhadap tertuduh. Di penutupan kes pendakwaan, didapati bahawa kes prima facie telah dibuktikan terhadap tertuduh dan dia dipanggil membela diri. Dalam pembelaannya, tertuduh memberi keterangan bersumpah bahawa dia tidak mempunyai pengetahuan mengenai mercun dan bunga api dalam lori tersebut. Dia memberi keterangan bahawa dia dibayar oleh Ah Hock untuk memandu ke Changlun untuk membawa keropok udang dan dia percaya bahawa dia membawa kotak-kotak berisi keropok udang di dalam lori. Majistret menerima pembelaan tertuduh kerana dua sebab. Pertama, kerana satu daripada telefon bimbit yang dirampas dari belakang lori merupakan kepunyaan Ah Hock dan kedua, kerana lori tersebut disewakan kepada Ah

Hock. Oleh itu, tertuduh didapati tidak bersalah, dibebaskan dan dilepaskan. Meskipun tertuduh dibebaskan, majistret mengarahkan lori motor dirampas. Ini merupakan rayuan terhadap keputusan majistret untuk membebaskan tertuduh. Pihak pendakwaan menghujah bahawa majistret telah salah arah dari segi undang-undang.

Diputuskan, membenarkan rayuan pihak pendakwaan:

(1) Pendekatan yang diambil oleh majistret bagi mempertimbangkan pembelaan adalah salah. Didapati bahawa dia telah memperkenalkan elemen milikan eksklusif ke dalam kesalahan mengenai membawa barang-barang yang dilarang di bawah s 135(1)(e) Akta. Oleh itu, beliau tersilap menumpukan perhatian sama ada pembelaan telah dipatahkan atas imbangan kebarangkalian, anggapan pengetahuan di bawah s 135(2) Akta daripada memperkatakan mengenai isu milikan eksklusif. Ini merupakan salah arah kerana tiada arahan. Sekiranya beliau telah mengarahkan dirinya dengan baik, maka beliau tidak akan membuat keputusan sepertimana yang dilakukannya (lihat perenggan 13 & 18).

(2) Selanjutnya, majistret telah menganggap kedua-dua beban iaitu beban untuk mematahkan anggapan atas imbangan kebarangkalian dan beban untuk menimbulkan keraguan yang munasabah dalam kes pihak pendakwaan sebagai satu perkara yang sama (lihat perenggan 15).]

Notes

For a case on s 135, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 118.

Cases referred to

Illian & Anor v PP [1998] 1 MLJ 421, SC (refd)
Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru [1981] 2 MLJ 249, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Ng Eng Kooi & Anor v PP [1970] 1 LNS 86 (refd)
PP v Guan Sheng Trading Sdn Bhd [1997] 4 MLJ 20, HC (refd)
PP v Yuvaraj [1969] 2 MJL 89, PC (refd)

Legislation referred to

Customs Act 1967 ss 127(1), 135(1)(e), (2)
Dangerous Drugs Act 1952

Nurul Ezwaney bt Husin (Deputy Public Prosecutor, Kedah) for the appellant.
Loo Yook Khin (YK Loo & Cheng) for the respondent.

Zamani A Rahim JC::

THE CHARGE

[1] The charge proffered against the accused was under s 135(1)(e) of the Customs Act 1967 ('the Act') which reads as follows:

> Bahawa kamu pada jam lebih kurang 11.50 malam pada 2.1.2004 di KM10 Lebuh Raya Bukit Kayu Hitam-Changlun, di dalam Daerah Kubang Pasu, Kedah Darul Aman dengan diketahui terlibat dalam mengangkut barang-barang larangan, iaitu 85 kotak mercun dan bunga api bernilai RM28.456.00 di dalam motor lori jenis TOYOTA nombor pendaftaran PBQ 1894. Barang-barang berkenaan adalah barang-barang yang dilarang diimport dibawah Perintah Kastam (Larangan Mengenai Import) 1998 kecuali di bawah dan dengan satu lesen import yang sah dengan niat untuk mengelak larangan tersebut dan telah melakukan suatu kesalahan di bawah Seksyen 135(1)(e) dan kamu boleh dihukum di bawah seksyen 135(1)(iii)(aa) Akta Kastam 1967.

[2] The accused claimed trial to the charge.

PROSECUTION CASE

[3] The prosecution's case is as follows. Acting on information received on 2 January 2004, at about 8.50 pm, a team of customs officers consisting of SP1, SP2, SP3 and two others laid an ambush in front of Bank Simpanan Nasional, Changlun. They were on the look out for a Toyota motor lorry bearing registration No PBQ 1894.

[4] At about 11.50 pm, the customs officers spotted the said motor lorry, PBQ coming from the direction of Kodiang, passed Changlun town and stopped at the traffic light. The customs officers tailed the said motor lorry until it was stopped at km 10, Lebuhraya Bukit Kayu Hitam/Changlun. SP1 approached the driver. He was accused. The accused was alone. SP1 identified himself as a custom officer and requested the accused to unlock the padlock at the rear of the said motor lorry. The accused complied. A cursory examination of the goods in the said motor van was carried out and found to contain firecrackers and fireworks. Two handphones were also recovered. The firecrackers and fireworks are prohibited goods under the Customs Act 1967.

[5] The said motor lorry was taken to the customs prevention store at Bukit Kayu Hitam where thorough examination was conducted. As a result, a total of 85 boxes of firecrackers and fireworks were found. A police report was accordingly lodged vide Changlun Report No 000005/04.

[6] The case was investigated by SP4. His investigation revealed that motor lorry PBQ 1894 was registered under Perniagaan Heng Huan and its business was owned by Heng Poh Ngong. According to Heng Poh Ngong who had since passed away, he had rented the said motor lorry PBQ 1984 to one Ah Hock. Ah Hock could not be traced as information on him was lacking.

[7] At the end of the case for the prosecution it is found that a prima facie case has been established. The presumption of knowledge of prohibited goods under s 135(2) of the Act had been raised against the accused. The accused defence was called.

DEFENCE CASE

[8] The accused elected to give evidence on oath. In his defence he said that on the night of 2 January 2004 he was at home when his friend by name of Ah Hock came to the house. Ah Hock came with a motor lorry. He invited the accused to drive him to Changlun to bring prawn crackers. Ah Hock promised to pay him RM100. The accused said he was not familiar with the road to Changlun. But Ah Hock accompanied him in the said lorry.

[9] Upon arrival at the traffic light in Changlun, on the instruction of Ah Hock, he turned left. He continued driving the said lorry for about 2–3km when he stopped. Again he stopped on the instruction of Ah Hock. Soon thereafter, a motorvan came from the opposite had stopped beside his lorry. The driver of the said motorvan unloaded boxes of prawn crackers into his lorry with the assistance of Ah Hock.

[10] Having completed the transfer of prawn cracker's boxes, the rear door of his lorry was locked. Again at the behest of Ah Hock, the accused turned back to Changlun town. Before reaching the traffic light, Ah Hock got down the lorry and asked the accused to proceed the journey and waited for him after the Balai Polis Changlun.

[11] According to the accused, on reaching the traffic light, he was stopped by a team of custom officers. A custom officer instructed him to open of the lorry, which he did. Upon examining the lorry, the custom officer informed him the goods in the van were not prawn crackers but firecrackers. Two handphones were found in the van. According to the accused, he informed the custom officers that the goods in the lorry and one of the handphones belonged to Ah Hock, the other was his. The accused denied having any knowledge of the firecrackers and fireworks in the body of the lorry.

THE DECISION OF THE MAGISTRATE

[12] In acquitting and discharging the accused after the defence case, the

learned magistrate seemed to have accepted the accused defence that he was not concerned in the conveyance and had no knowledge of the firecrackers and fireworks in body of the lorry PBQ 1894. He was only paid to drive the lorry by Ah Hock. According to the learned magistrate the existence of Ah Hock to whom the accused pushed the blame to, was probably true based on two grounds. Firstly, the seizure of two handphones from the lorry, one of which allegedly belonged to Ah Hock. Secondly, SP4's investigation disclosed that the owner of the motor lorry, PBQ 1894 was one, Heng Poh Ngoh. He had rented the vehicle to Ah Hock.

[13] The approach taken by the learned magistrate to consider defence case was misplaced. She considered that the prosecution had failed to prove the accused had *exclusive possession* of the firecrackers and fireworks, the subject matter of the charge. It would appear that she had introduced the element of exclusivity of possession into the offence of *knowingly* concerned in the conveying of prohibited goods under s 135(1)(e) of the Act. The learned magistrate had omitted to properly address her mind as to whether the defence had rebutted, on the balance of probability, the presumption of knowledge under s 135(2) of the Act rather than labouring on the issue of exclusive possession. This is a misdirection by way of non-direction. Presumably, the learned magistrate had got mixed up with the element of exclusive possession which is commonly raised and familiar in the field of our drugs laws — Dangerous Drugs Act 1952. This is how the learned magistrate put it:

> Setelah meneliti keseluruhan dalam kes ini mahkamah mendapati *pendakwaan gagal membuktikan tanpa keraguan yang munasabah* bahawa tertuduh mempunyai 'exclusive possession' ke atas barang kes yang dirampas.

[14] Not only she had misdirected herself on the ingredient of the offence charged, she also had a jaundiced understanding of the law on burden of proof, be it on the prosecution, as manifested in the above passage, and also on the defence. In dealing with the burden on the defence, this was how she wrote:

> Di akhir kes pembelaan mahkamah ini berpuas hati dan mendapati bahawa di bawah *imbangan kebarangkalian* tertuduh telah berjaya timbulkan satu *keraguan yang munasabah* di akhir kes dan pendakwaan telah gagal membuktikan satu kes melampaui keraguan yang munasabah terhadap tertuduh. Oleh itu, mahkamah telah melepaskan dan membebaskan tertuduh ini daripada tuduhan yang dikemukakan di akhir kes bela diri.

(at p 159 of the appeal record.)

[15] It would appear the learned magistrate had treated both burdens, that is, to rebut the presumptions on the balance of probability and to raise a

reasonable doubt in the prosecution case as one and the same thing. She lumped up together and made no distinction between the two burdens. Accordingly, the learned magistrate found the accused not guilty, acquitted and discharged him. In the Supreme Court Criminal Appeal *Illian & Anor v Public Prosecutor* [1998] 1 MLJ 421, Wan Suleiman SCJ made the following observations as regard on the trial judge failure to draw the distinction of the two burdens:

> Regarding Yu, the judge said that he had not rebutted the presumptions on a balance of probability nor had he raised a reasonable doubt in the evidence led by the prosecution, and found him guilty. We must again perforce say that here again *the learned judge appears to regard both burdens as being the same*.
>
> Whilst we are on the same matter, His Lordship had even earlier shown that *he made no distinction between the two burdens* as would appear again and again in various parts of his judgment. To cite another example, under the heading 'court finding', he had earlier recorded: 'The court always borne in mind the onus on the defence is slight ie to rebut the statutory presumptions on the balance of probability and to raise a reasonable doubt in the prosecution's evidence'.

[16] In the light of several misdirections in law by the learned magistrate, I can do no better than to bring her attention to the exposition of the law on burden of proof as neatly laid down in the Supreme Court Criminal Appeal *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 where Mohamed Azmi SCJ said at p 171:

> It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove *beyond reasonable doubt* the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions *on the balance of probabilities* which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. To earn an acquittal at the close of the case for the prosecution under s 173(f) or s 180 of the Criminal Procedure Code, the court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (*Munusamy v Public Prosecutor*). If defence is called, the duty of the accused is only to *cast a reasonable doubt* in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

[17] The learned magistrate is also advised to read and comprehend the Privy Council case of *Public Prosecutor v Yuvaraj* [1969] 2 MJL 89 and the

Federal Court case of *Ng Eng Kooi & Anor v Public Prosecutor* [1970] 1 LNS 86 relating to the quantum of proof on the accused to rebut the statutory presumptions on the balance of probabilities.

THE DECISION OF THIS COURT

[18] On the evidence, if the learned magistrate had properly directed herself on law and facts, she would not have arrived at the decision she did. I, therefore, allowed the prosecution appeal. In the circumstances of this case, the accused was fined RM50,000, in default six months imprisonment.

FORFEITURE

[19] Despite acquittal of the accused, the learned magistrate had made an order of forfeiture of motor lorry, PBQ 1894 to the customs department. That called for the consideration of s 127(1) of the Act.

[20] Section 127(1) provides:

> An order for the forfeiture or for the release of anything liable to forfeiture under this Act shall be made ... and an order for the forfeiture of goods shall be made if it is proved to the satisfaction of the Court that an offence against this Act or any regulation made there under has been committed and that *the goods were the subject matter of or were used in the commission of the offence notwithstanding that no person may have been convicted of such offence*.

[21] I am of the view that s 127(1) is clear and unambigous. It is mandatory that the court orders forfeiture notwithstanding that there may be no conviction if the following two conditions are proved to the satisfaction of the court, namely:

(1) that an offence against the Act has been committed.

(2)

(i) that the goods were the subject matter of the offence, or

(ii) where the claim relates to the conveyance, such conveyance was used in the commission of the offence.

- see the judgment of Abdul Hamid FJ (as he then was) in *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 at p 250.

[22] In *Public Prosecutor v Guan Sheng Trading Sdn Bhd* [1997] 4 MLJ 20 and the conclusion of his judgment, Abdul Malik Ishak J said at p 34 as follows:

The words 'notwithstanding that no person may have been convicted of such offence' appearing in s 127(1) of the Act make it inevitable that the forfeiture cannot be avoided even if the accused was acquitted of the charge against him provided the trial court is satisfied that 'the goods were the subject matter of or were used in the commission of the offence'. As Syed Agil Barakbah J (as he then was) said in *Public Prosecutor v Lee Wye Kheng* at p 40:

> With regard to the cross-appeal by the respondent against the order of forfeiture of the exhibits, I am in agreement with the learned president. The exhibits have been proved to be prohibited goods and found in the possession of the respondent. The trial court was satisfied that an offence against the Act has been committed, ie the gold coins were imported by person or persons unknown without licence. The respondent was acquitted on the ground that he had no knowledge that they were prohibited. The exhibits were the subject matter of the offence. They still remain prohibited goods. They were liable to forfeiture and ought to be forfeited even though the respondent was not convicted of the offence charged. I am of the opinion that the provision of s 127 of the Customs Act applies on all fours.

[23] Accordingly, I affirmed the forfeiture order made by the learned magistrate.

Appeal allowed.

Reported by Kohila Nesan